

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE**

WRIT PETITION NO. 435 OF 2007

Anant Gangadhar Joshi & anr..... Petitioners

versus

Smt. Shantabai Mahadev Kokane..... Respondent.

Shri A.A. Garge for the petitioner
Mrs. Anjali Halekar for the respondent.

**CORAM; A.P. DESHPANDE, J.
DATED; 18TH JUNE, 2007**

P.C.;

1. Rule. Rule made returnable forthwith. Taken up for final hearing by consent of parties.

2. This writ petition is filed by the original defendant calling in question the impugned order passed by the trial court declining to issue witness summons to one of the witness, proposed to be examined by the defendant and proceeding further, rejected the application moved under Order 16(1)(3) of CPC. Few facts, that are necessary to adjudicate the issue are set out in brief hereinbelow.

3. The respondent instituted a suit against the petitioner in the Court of Civil Judge, Junior Division, Kalyan, for possession on the ground that

the respondent reasonably and bonafidely needs, for personal occupation, the premises which are in occupation of the petitioner as a tenant. The issues came to be framed on 5-5-2004, the evidence of the respondent/plaintiff commenced on 25-11-2004 whereas the evidence of the plaintiff was closed on 3-2-2005. Even before the evidence of the respondent/plaintiff commenced the present petitioner/defendant filed an application before the trial court furnishing the name and address of the witness whom the petitioner/defendant proposes to examine. Perusal of the application dated 20th September 2004 clearly reveals that even before the commencement of the evidence of the plaintiff, the name of the said witness was furnished by the defendant. In substance the petitioner/defendant had urged the court to add the said name in the list of witness. Somehow no order was passed on the said application. Under a mistaken belief that the said application had been allowed, the petitioner defendant moved an application before the trial court on 14-2-2006 seeking witness summons. The said application came to be rejected by the trial court by an order dated 21-4-2006. Thereafter yet again another application was moved on 20-6-2006 and the same was rejected by an order below Exh.91 on 28-9-2006. The record reveals that the petitioner/defendant has unnecessarily moved repeated

applications before the same court when his first and second applications were rejected. On account of filing of repeated applications, no doubt the proceedings are delayed and protracted.

4. The learned counsel for the petitioner points out that the issue that arises in the suit is as to whether the need of the respondent landlord in regard to the suit premises is reasonable and bonafide and in that context the cross examination of the respondent/plaintiff reveals that the plaintiff has purchased a flat in Sudhamshu chambers admeasuring about 486 sq. ft. The respondent has admitted in the cross examination that the said flat has been purchased in her name. But the respondent has stated that the possession thereof has not been handed over by the builder and as such the said flat cannot be taken into account to examine as to whether the plaintiff's need is bonafide and reasonable. The evidence of the builder is material for adjudicating the issue involved in the suit. For the delay that has occurred on account of repeated making of applications before the trial court by the petitioner, the respondent can be adequately compensated. The trial court while rejecting the application moved by the petitioner, has made it clear that it shall be open for the petitioner to seek presence of the

witness without intervention of the court and the petitioner thereafter did issue notice to the concerned witness calling upon him to remain present before the court as a witness in the suit. But despite oral and written intimation, the witness has chosen not to remain present. In this fact situation, in my view, cause of justice would advance if the witness summons is issued to the witness named in the application filed by the petitioner dated 20-9-2004, as the issue involved would stand decided on merit. If the witness summons is not issued, the petitioner is likely to suffer irreparable loss as he would not be in a position to establish the fact that the respondent has secured possession of the flat from the said witness/builder. In the interest of justice the present petition deserves to be allowed and I proceed to allow the same.

5. The impugned orders passed by the trial court are quashed and set aside and the petitioner's application for issuing witness summons under Order 16 Rule 3 is allowed. The trial court shall issue witness summons to the witness under Order 16(1)(3) of CPC. The learned counsel appearing for the petitioner assures this court that the petitioner will not, in any manner delay the progress of the suit. Writ petition thus stands allowed subject to the payment of costs of

Rs.10,000/- by the petitioner to the respondent. The cost shall be deposited in the trial court within a period of four weeks from today. Rule made absolute in the above terms.